TENGKU HJ. JAAFAR IBNI ALMARHUM TENGKU MUDA ALI & ANOR.

v.

THE GOVERNMENT OF THE STATE OF PAHANG

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
HASHIM YEOP SANI SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 376 OF 1985]
4 DECEMBER 1986

LAND LAW: *Inter vivos gift of land dated 1886 - Validity of gift - Whether reasonable cause of action - System of law applicable - Shariah - Certainty of description - Pahang Land Regulations 1889 - Non-registration.*

By a document dated 19 January 1886, the then Sultan of Pahang, Sultan Ahmad Muadzam Shah made an *inter vivos* gift of a large tract of land described as "all that river district being the basin of Sungei Tembeling and all the tributaries from their sources to their mouths and situate in the State of Pahang" to his daughters Tengku Long and Tengku Dalam. The appellants, being the son and grandson of Tengku Long, claimed that they were lawfully entitled to the land described in the said royal document, maintaining it to be a valid and still subsisting document of title. Vohrah J held that although there was a reasonable cause of action, the suit was barred by the Statute of Limitation. Hence this appeal.

Held:

[1] The appellants did not have a reasonable cause of action as the gift of land was made almost three years before the Pahang Land Regulations 1889; therefore the land law applicable was the Shariah law. Under that law a gift of land will not be valid unless the donee takes possession of the land at the time the gift is made. The appellants' statement of claim had nothing to show that the donee had taken possession of the gift land either actually or constructively.

[2] Further, the description of the gift land was too vague and could only have been ascertained by occupation or taking possession of the land.

[3] The gift land was never brought into the system of the 1889 Land Regulations at all. It had never been recognised by the State Government as Class I land (agricultural concessions) or registered as such, nor registered as Class II Land (native occupied land under Malay tenure). The gift land therefore remained State land and continued to be so under successive land legislation.

[Appeal dismissed. Each party to bear its own costs; appeal deposit to be refunded to appellants.]

Cases referred to:

The Pahang Consolidated Company Limited v. The State of Pahang [1931-32] FMS LR 390
Mohamed Abdul Ghani & Anor. v. Fakhr Jahan Begum & Ors. [1921-1922] ILR 49, IA 195
Amjad Khan v. Shraf Khan [1928-1929] ILR Vol 56, IA 213
The Jelai Concession (Pahang) Limited v. Dato Wan Tanjong (Dato Maharaja Perba Jelai), John Harold Irving [1931-1932] FMS LR 1

Legislation referred to:

Land Enactment 1897 (Pahang), s. 2
Registration of Titles Enactment 1911, s. 5

Other source referred to:
A Collection of Treaties affecting the States of Malaysia 1761-1963, Vol. 1, pp. 347-355
Mohammadan Law, Syed Ameer Ali, 4th Edn. Vol. I, p. 41

For the appellants - H.L. Tennakoon; M/s. H.L. Tennakoon
For the respondent - Wan Mohamed bin Wan Muda, State Legal Adviser, Pahang

JUDGMENT

Salleh Abas LP

This is an appeal from the decision of Vohrah J striking out the writ and the statement of claim of the appellants.

The facts of the case are largely not in dispute and these are as follows:

On 19 January 1886 corresponding to 6th day of Jamadil Awal 1305 the Sultan of Pahang, Sultan Ahmad Muadzam Shah by a document bearing the same date made a gift *inter vivos* of a large tract of land described as "all that river district being the basin of Sungei Tembeling and all the tributaries from their sources to their mouths and situate in the State of Pahang" to his daughters Tengku Long and Tengku Dalam. The first appellant is the son of Tengku Long, whilst the second appellant is her grandson, being the son of the first appellant. Both appellants claim that they are lawfully entitled to the land described in the said royal document, which they maintained to be a valid document of title and still subsisting.

They filed a suit which is the subject matter of this appeal in the High Court asking for a declaration to that effect. The respondent denied the gift and any knowledge of it and in their application to strike out the suit they have four reasons why the Court should do so; two of which are - (1) their statement of claim does not disclose any reasonable cause of action and (2) the suit is statute-barred. Their application was heard by Vohrah J who held that there was a reasonable cause of action, but the suit is caught by the Statute of Limitation.

We think however that the question of the reasonableness of the appellants' cause of action which the learned Judge seemed to have passed over and accepted as being established without much discussion is of primary importance and should first be examined by us before any consideration of the applicability or otherwise of the Statute of Limitation. For unless and until the appellants can show that they have a reasonable cause of action, any discussion on the applicability of the statute to their claim would be premature and irrelevant.

We therefore propose to examine the legal effect of the royal document of 19 January 1886 purporting to give the said land to Tengku Long and Tengku Dalam.

For this purpose it is necessary to look back into the state of affairs prevailing in Pahang at the time when the gift was made.

Historical perspective

It is a matter of history that Pahang was an independent state before she came under the British protection in 1889. Sultan Ahmad Muadzam Shah, otherwise known as Wan Ahmad became the undisputed ruler of Pahang after defeating his brother Tun Mutahir following the death of their father, Bendahara Tun Ali in 1857. Sultan Ahmad Muadzam Shah was a single-minded ruler and opposed to British influence in his state. The British on the other hand were keen to have some measure of control over the government of Pahang with a view of safe-guarding their commercial interests, which they feared were in jeopardy by indiscriminate concessions, often ill-defined and overlapping, given by the Sultan to various people. Their interests in gaining political control of the State was further heightened by

rumours of Pahang's great mineral wealth. Unwilling as the Sultan was, in 1887 through the urging of Hugh Clifford and persuasion of the Sultan of Johor, who two years earlier had signed a similar treaty, Sultan Ahmad Muadzam Shah finally relented and agreed to sign an Anglo-Pahang Treaty. Under this treaty Hugh Clifford became a British agent in Pahang with consular status. This was the beginning of the British intervention in the state. In the following year (1888) the murder of a Chinese named Jo Hui (Go Cui) who was allegedly a British subject provided a first class opportunity for Clementi Smith, the Governor of the Straits Settlements to seize upon the incident to extract a sort of recapitulation letter from the Sultan. In this letter dated 24 August 1888 the Sultan acknowledging responsibility for the murder requested the British Government to send a British officer to assist him "in matters relating to the Government of Pahang on similar system to that existing in other Malay States under British protection" and in return the Sultan asked for British guarantee to him and his successors of all their privileges and powers and also an undertaking not to interfere with Malay custom and Islamic religion. In 1889 Sultan Ahmad Muadzam Shah abdicated the throne in favour of his son Tunku Mahmud (see *'A Collection of Treaties affecting the States of Malaysia* 1761-1963', Vol. 1, pp. 347-355).

There can be no doubt that before the British intervention, the Sultan was an absolute ruler of his state in whom powers to make laws and to govern the state were vested, and that he exercised these powers presumably after advice of or more appropriately, consultation with his Orang-Orang Besar (ministers), was sought or held. After the British intervention, however, he still remained an absolute ruler but was required to administer the state with the advice of a British Resident. But in practice as shown in the judgment of the Privy Council Appeal No. 27 in The *Pahang Consolidated Company Limited v. The State of Pahang* [1931-32] FMS Law Reports p. 390, it was the British Resident who exercised the powers on behalf of the Sultan. In this case, a mining lease in respect of a large tin mine in Pahang which was the subject matter of the suit was granted on 8 December 1898 by the British Resident on behalf of the Sultan.

One of the primary reasons of the British intervention in Pahang was their concern at the indiscriminate concessions of agricultural lands given out by the Sultan to all and sundry in order to boost-up the state's revenue. The British were fearful that unless the grant of concessions was exercisable on a rational basis there would be chaos and disputes would arise which would finally affect their commercial interests adversely. Hence once they obtained control over the government they lost no time in introducing their system of administration. A number of regulations were soon made and the most important one is the Government Land Regulations dated 31 December 1889.

The Regulations were the beginning of the present system of land administration in Pahang. Until then the land law applicable was Shariah law of the Shafie school. Eight years later the Regulations were repealed and replaced by the Land Enactment 1897, and the Registration of Title Enactment 1897 which came into force on 29 November 1887 and 24 December 1897 respectively. The 1897 Land Enactment was subsequently replaced by the Land Enactment 1903 which came into force on 1 July 1903, and this Enactment was later superseded by FMS Land Code 1926 on 24 December 1926 and finally by the present National Land Code in 1965.

Muslim law

The gift of land in this appeal was made by the Sultan almost three years before the 1889 Land Regulations and there can be no doubt that the land law applicable to this gift was Shariah law. By this law a Muslim acquires ownership of any piece of land which has never been cultivated in a Muslim country by clearing and working upon it. A non-Muslim however cannot acquire title to the land by this method. He has either to get it from the sovereign or

from a Muslim owner by way of gift or sale (Minhaj-et-Talibin p. 226). As regards gift of land, whether it be to a Muslim or to a non-Muslim the gift will not be valid unless the donee takes possession of the gift land at the time the gift is made. In other words, a gift will transfer the ownership of the subject matter of the gift to the donee only upon the latter taking possession of it. (Minhaj-et-Talibin p. 234). In *Mohamed Abdul Ghani & Anor. v. Fakhr Jahan Begum & Ors.* [1921-1922] ILR Vol 49, IA 195, and *Amjad Khan v. Shraf Khan* [1928-1929] ILR Vol 56, IA 213, which dealt with the validity of gift under Muslim law the Privy Council applied the same principle. In these two cases their Lordships accepted the view of Syed Ameer Ali (the learned author of *Mohammadan Law*, 4th Edn. Vol. I, p. 41) to the effect that to constitute a valid gift there must be three constituent elements, namely (1) a manifestation of the wish of the donor to give; (2) the acceptance of the donee either implied or expressly; and (3) the taking possession of the subject matter of the gift by the donee, either actually or constructively.

Turning now to the royal document which is relied upon by the appellants, we have no hesitation to say that the first two elements of a valid gift, i.e., offer and acceptance are established. But as to the third element there is nothing to show in the statement of claim that the donees had ever taken possession of the gift land at all either actually or constructively. Hence the gift failed. It failed because it was never perfected or consumated by the taking of possession.

Description of the land

It is a matter of general commonsense that any law must always aim at achieving certainty, otherwise it will fail to play its role in regulating social conditions. The requirement of taking possession by the donee as a condition for the transfer of ownership is aimed at ensuring certainty of the subject matter of the gift and for the purpose of conferring public recognition that the donee has become the owner of the gift property. This is all the more necessary when the subject matter of the gift is so ill-defined and so vaguely described without proper delienation as the land in this case. To describe the gift land as "all that river district being the basin of Sungei Tembeling and all the tributaries from their source to their mouths and situate in the state of Pahang" is so vague as to mean nothing. While it could be somewhere, it could also mean everywhere and nowhere. How far in land are the boundaries of the gift land from each side of the banks of Sungei Tembeling and its tributaries? What was the extent of river district? What was the size of the land? No answers to these inquiries, in our view, can be given by the descriptions of the land stated in the royal gift. Only by occupation or taking possession of the land could the extent of the donee' control be determined with precision and proper boundaries ascertained.

Pahang Land Regulations 1889

Another objection to the appellants' case is that the gift land was never brought into the system of the 1889 Land Regulations at all. It is unthinkable that this land should be left out of the system since the Regulations were intended to be so comprehensive as to cover all the lands in the state of Pahang. For this reason the Regulations enacted that all lands in the state were divided into the following four classes:

Class I - land available for agricultural purposes;

Class II - land in occupation of natives under Malay tenure;

Class III - building allotments in towns and villages or government reserves; and

Class IV - mining reserves.

The main aim of the Regulations was to introduce a system of compulsory registration of lands in the state with a view to exercising some control over the Sultan's power of issuing concessions in discriminately. We are not concerned here with the 3rd and 4th classes of lands since the gift land is neither a building allotment nor a mining reserve. Thus, we will only deal with the first two classes of lands.

Under the Regulations all holders of concessions of Class I lands (lands available for agricultural purposes) granted by the Sultan had first to be recognised by the state Government and only the recognised concessions were required to be registered in the district land office. Failure to register them, despite recognition by the Government, rendered these concessions void. As regards Class II lands i.e. lands occupied by natives under Malay tenure, such lands were required by the Regulations to be registered in the "Register Native Holdings" kept by the District Collector within three months of the date of the Regulations. Failure to register them rendered the rights of the occupiers in respect of such lands liable to forfeiture.

We were referred to a document dated 4 January 1901 purporting to be a diary kept by the late Sultan Ahmad Muadzam Shah concerning the gift land. According to this diary the late Sultan wrote a letter on 12 October 1900 to the then British Resident Hugh Clifford in which he maintained that although he (the late Sultan) agreed to the request by the British Resident to cancel all concessions, he however did not consent to the cancellation of his gifts to his children and to other absolute grants.

The admissibility of this diary was objected to by the respondent, presumably on the ground of lack of authenticity and of the hearsay contents of the letter written by the late Sultan on 12 October 1900 which the diary purported to have stated.

In our view, without considering the admissibility of the diary, i.e. even if it is admitted as evidence, we cannot see how it would assist the appellants to prove their title to the gift land. The diary seems to indicate that the Pahang state Government did not recognise the title of the gift land and that is why the late Sultan - by then he was no longer the Sultan because of his abdication in favour of his son - pleaded with the British Resident to accord recognition thereto so that is could be registered under the General Land Regulations 1889. This diary is therefore not of assistance to the appellants' case.

Counsel for the appellants also referred us to *The Jelai Concession (Pahang) Limited v. Datoh Wan Tanjong (Dato' Maharaja Perba Jelai), John Harold Irving* [1931-1932] FMS LR 1 According to this case, the issue therein was different from the issue which we are called upon to decide in the present appeal. In the *Jelai Concession* case the late Sultan of Pahang on 20 August 1887 gave a large tract of land situated on the river Jelai Kechil in the district of Kuala Lipis to Dato' Maharaja Perba Jelai. On 26 July 1923 his son also assuming the same title, gave a mining lease over this land to two Chinese for a term of 50 years. The two Chinese in turn assigned this lease to the Jelai concession syndicate on 30 June 1924 which eventually assigned the lease to the Jelai concession (Pahang) Limited. The late Dato's son refused to recognize the assignment on the ground that the lease he had given to the two Chinese on 26 July 1923 was invalid because it was not registered under s. 5 of the Registration of Titles Enactment 1911. According to this section any transfer of land whether by mortgage, charge or otherwise must be registered, otherwise it would not be effective. Chief Justice Elphinstone held that s. 5 did not apply to the land held for mining purposes and thus the lease granted by the son of the late Dato' to the two Chinese on 26 July 1923 was valid. It must be noted that the question of the validity of the gift of land by the late Sultan to the late Dato' was not in issue at all. The title of the lessor (the son of the late

Dato) who gave the lease in favour of the two Chinese was not questioned. We would therefore assume that the land in question must have been recognised and registered under the General Land Regulations.

The position in the present appeal is entirely different because the issue here relates to the validity of the gift and the title of the donee under the gift. We therefore hold that the *Jelai Concession* case has no application to the present case under appeal.

As regards new concessions and new occupations of native lands, these would nave to be applied for and given out in accordance with the procedure laid down by the Regulations.

Another principle introduced by the Regulations was that the land must have proper boundaries and proper shape. The land must therefore be surveyed and boundaries fixed.

Conclusion

In the case before us the gift land, if it were treated as a concession, was never recognised by the state Government nor was it registered; and if it were regarded as a native occupied land under Malay tenure, it was also not registered as required by the Regulations. It is obvious therefore that the gift land was at all times state land and its ownership was never transferred to the donees despite the royal document because of the failure of the donees to take possession of the land at the time when the gift was made.

That being the case, this land therefore remained state land and continued to be so under successive land legislation. Section 2 of the 1897 Land Enactment which replaced the 1889 Land Regulations defined "state land" as follows:

> 'State land' means all lands which have not been and may not hereafter be reserved for any public purposes, or which have not been leased or granted to or are not lawfully occupied by any person, and includes all lands which, at the commencement of this Enactment, may have become or which hereafter may become forfeited by reason of any breach in the conditions on which the same have been lawfully occupied.

The same definition of state land was repeated by the 1903 Land Enactment.

In view of the definition it is not possible to hold the gift land to be otherwise than state land. Thus it is clear that the gift land remained at all times state land.

On the question of limitation, in view of our decision there is no need for us to go into it. Further even if the question is relevant we would find no justification to interfere with the judgment of the learned Judge.

Thus for the reasons stated above the appeal is therefore dismissed. In this case we feel that it is only fair that each party should bear its own costs. Therefore the appeal deposit should be refunded to the appellants.

Also found at [1987] 2 CLJ 129